No. 11,194

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

ZOA H. ZANE and JACK ZANE, her husband,
Appellees.

APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United States for the District of Arizona.

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I.

JURISDICTIONAL STATEMENT

This suit was originally brought in the District Court of the United States for the District of Arizona by the filing on December 9, 1944, of a complaint in which plain-

NOTE: All figures in parentheses, thus (3), refer to pages of the printed transcript of record unless otherwise expressly identified.

tiffs seek to recover from defendant damages in the sum of Fifty-one Thousand Five Hundred Sixty-five Dollars ($51,565.00) by reason of injuries received by the plaintiff, Zoa H. Zane, in a motor passenger bus accident which occurred on or about December 11, 1942, in the vicinity of Indio, California. It is alleged in the complaint that after said accident the defendant paid plaintiffs the sum of Fourteen Thousand Five Hundred Dollars ($14,500.00) in settlement of the same, and a written release was signed, executed, and delivered to the defendant by the plaintiffs; but it is further alleged that at the time of the execution of said release the plaintiffs believed that the only injury received by the plaintiff, Zoa H. Zane, was an injury to her right foot and lower right leg which necessitated amputation of the said right leg below the knee. It is further alleged that thereafter plaintiffs discovered that in addition to the injury necessitating the amputation of Zoa H. Zane's right leg below the knee, she suffered a fracture of her right femur or thigh bone at the time of said accident which was unknown at the time of the execution of the release, and the damages sought to be recovered are on account of said injury (2-20).

The jurisdiction of the District Court over the parties and the subject matter was invoked under Paragraph (1), Section 41, Title 28, United States Code, because: (a) the suit is between citizens of different states, plaintiffs being citizens and residents of the State of Arizona, and the defendant being a citizen and resident of the State of California, duly qualified and authorized to do business in the State of Arizona as a foreign corporation (2); and (b) the value of the matter in controversy exceeds exclusive of

interest and costs the sum of Three Thousand Dollars ($3,000.00) (20).

Jurisdiction is conferred upon this court to entertain and decide the case upon this appeal by Section 225, Title 28, United States Code (the case not falling within Section 345 of the same title) in that a verdict of the jury for the sum of Ten Thousand Dollars ($10,000.00) in favor of the plaintiffs was returned on May 22, 1945 (58), and on May 28, 1945, judgment was entered in favor of plaintiffs and against said defendant on said verdict for the sum of Ten Thousand Dollars ($10,000.00) together with interest thereon at six per cent (6%) per annum from May 22, 1945, and for costs taxed and allowed in the sum of Twenty-three Dollars and Twenty-six Cents ($23.26) (59-61). On June 1, 1945, defendant filed its motion for judgment for defendant notwithstanding the verdict and for judgment in accordance with motion for directed verdict; and alternative motion for new trial (61-65), which motions were denied on July 25, 1945 (67). Thereafter on October 18, 1945, defendant filed notice of appeal, supersedeas and cost bond, and designation of record and proceedings to be contained in record on appeal (68-72).

II.

STATEMENT OF THE CASE

The complaint filed herein is in three counts, the first count stating in substance as follows:

After alleging jurisdictional facts, and the fact that defendant was a carrier of passengers for hire, it is stated

that the plaintiff, Zoa H. Zane, on December 11, 1942, was a paid passenger on a bus of the defendant, and that at a point in the State of California near Indio there was an accident due to the negligence of the defendant, and as a result plaintiff, Zoa H. Zane, received injuries to her right foot and lower portion of her right leg necessitating the amputation of the right leg below the knee, and in addition thereto received a fracture of her right femur or thigh bone. Recovery is sought in the sum of Fifty-one Thousand Five Hundred Sixty-five Dollars ($51,565.00) for said fracture of right femur or hip (2-6).

In the second count plaintiffs reiterate the allegations of the first count concerning the accident and injuries received, and in addition allege that the plaintiff, Zoa H. Zane, was taken to a hospital in Indio, California, where her right leg was amputated below the knee. Soon thereafter a claim agent of the defendant called upon the plaintiff at the hospital and stated that the attending doctor was defendant's doctor, and that defendant would pay for medical and hospital services and that the doctor was a capable physician, and that plaintiff could rely upon him. The doctor attended Zoa H. Zane daily and the claim agent visited her frequently, and both the doctor and claim agent were agents acting for the defendant. It is further alleged said plaintiff while in the hospital was in a weak condition, and the claim agent and doctor gained her confidence, and she relied upon and believed their statements; that said alleged agents of the defendant falsely represented to plaintiff that her only injury was the injury to the right foot and lower right leg which necessitated the amputation, and that she had not sustained any other injuries, and that she would

be able to use an artificial limb and be able to walk without the aid of crutches, and in course of time would be able to use an artificial limb to practically the same extent as though she had her natural leg and foot. It is further alleged that plaintiff believed and relied upon said representations which were false and untrue, and made by said agents knowing the same to be false and untrue, or recklessly made without regard to their truth or falsity; it is alleged that in addition to said amputation of leg plaintiff had in said accident received a fracture of her right hip. It is further alleged that while in said hospital said claim agent and doctor urged plaintiff, Zoa H. Zane, to agree upon a settlement of the claim for damages, and thereafter the plaintiffs, Zoa H. and Jack Zane, agreed with the claim agent upon a settlement of their claim for injuries below the knee for the sum of Fourteen Thousand Five Hundred Dollars ($14,500.00) which was paid, and plaintiffs executed and delivered to defendant a general release purporting to release and discharge the defendant for any and all claims from plaintiffs on account of the accident. It is further alleged in said second count that plaintiffs executed said release in reliance upon these representations of defendant's agents that the only injury received by Zoa H. Zane was that requiring amputation of the leg below the knee, and that they did not know for a long time afterwards of the existence of a fracture of the right hip, and the release was executed in ignorance of such additional injury, and the plaintiffs would not have executed the same if they had had knowledge of such injury to the hip, and for such reasons the release did not apply to the injury to the hip (6-11).

In paragraph VI of the second count of the complaint, Section 1542 of the Civil Code of California is set forth in haec verba (12). It is further alleged in said paragraph that under the decisions of the Supreme Court of the State of California, a release executed by one who has sustained injuries does not cover injuries unknown or unsuspected to exist at the time of the release, but covers only known injuries, and that no rescission of release or offer to restore consideration is necessary (12).

In paragraph VII of said second count it is alleged that the plaintiffs have not been able to tender or repay the consideration received by them from the defendant on account of the release for the reason that they did not know of injuries to the right hip of plaintiff, Zoa H. Zane, until long after the settlement was made; that, therefore, the plaintiffs have been and are unable to tender or repay to the defendant the consideration received by them; the plaintiffs further allege that they are unable to tender or repay the defendant the consideration received by them on account of the fact that they, the plaintiffs, have been compelled to spend a large portion of such moneys for medical, hospital, x-rays, nurses, and other expenses in trying to heal or cure said injury of the hip (12-13).

Paragraphs VIII and IX of said second count of the complaint set forth the damages alleged to have been suffered by the plaintiffs on account of said injury to the hip and seek recovery in the sum of Fifty-one Thousand Five Hundred Sixty-five Dollars ($51,565.00) therefor (8-9, 13-15).

The third count of the complaint is substantially the same as the second count. As we read it, the difference is in words

and not in substance and we do not deem it necessary to recite the allegations (15-20).

The answer denies all material allegations of the complaint and sets up the written release as a special defense (21-30).

III.

SUMMARY OF UNDISPUTED FACTS

From the evidence it appears that plaintiff, Zoa H. Zane, was a passenger on a bus of the defendant, and that on or about the morning of December 11, 1942, at a point near Indio, California, said bus collided with the rear end of a truck, and the plaintiff was injured. She had a child with her who was also injured. There is no necessity of going into details of the accident as defendant introduced no evidence denying negligence (87-88). She was taken to the Coachella Valley Hospital at Indio in an ambulance (89); some of the injured passengers were taken to the La Casita Hospital in Indio (344), and apparently the ambulances were furnished by the State Highway Patrol and the Sheriff's Office at Indio (350).

She was treated at the hospital by a Dr. Blackman, and her right leg below the knee was amputated (89-90). The amputation was on a Friday, and on the following Tuesday a Mr. Cameron, Claim Agent for the defendant, called upon plaintiff (93-94). About a week later Mr. Cameron called again and at first his calls were about a week apart (135). During his first three or four visits he made no effort to settle with plaintiff for her injuries and was only solicitous of her welfare, and stated that he was calling upon other

passengers injured in the accident and arranging settlements (134-135). He never discussed settlement and never asked plaintiff what she demanded, and made no offer until after the second operation upon the plaintiff, which operation was about six weeks after she entered the hospital (135-136). The second operation was for the purpose of repairing the stump to enable the patient to wear an artificial limb (97).

The first time Mr. Cameron asked plaintiff, Zoa Zane, what she would accept in settlement for her injuries, which was about six weeks after she entered the hospital, she demanded $50,000, which was refused (136). About a week later plaintiff offered to accept $25,000 which Cameron stated he would have to submit to the head office of the Greyhound Lines, and later returned to the hospital and advised plaintiff that the company would only pay $12,000 (137). Plaintiff, Zoa Zane, discussed this offer of settlement with her husband, Jack Zane, who was frequently in Indio, and was fully advised of all negotiations for settlement (137-138). After discussions between the plaintiffs, Zoa and Jack Zane, they decided to accept $15,000 for all injuries known to have been received in the accident (138), and with the approval of her husband (140), Zoa Zane sent the following telegram to Cameron on January 29, 1943: "Will Settle for 15000 Plus Hospital Expenses." (Defendant's Exhibit A—139). *The Greyhound Company paid the plaintiffs exactly what they demanded in the telegram—the company paid plaintiffs $14,500.00 for injuries to Zoa Zane, $500.00 for injuries to the child, and all hospital and medical expenses* (139-140).

About three days after plaintiff sent the telegram, Exhibit A, Cameron delivered plaintiff, Zoa Zane, at the

hospital a form of release (141) and as Jack Zane was not there at the time, he left the release to be executed upon his return (141), and such form of release was in Mrs. Zane's possession until February 19, 1943 (141-142). Mrs. Zane claims that the form of release so left with her by Cameron was not the same as the release finally executed —that it contained all of the same printed matter—but two of the blanks were filled in different in that the consideration was $14,500.00 instead of $15,967.00, and the injuries were recited as "loss of right foot and lower leg" (175-176).

Thereafter, on February 19th Cameron again called at the hospital and Mr. and Mrs. Zane were both present. The terms of the release were discussed *before it was signed* (145). The release was signed by the plaintiffs, Zoa Zane and Jack Zane before the witnesses, Alpha R. Marcum and M. Cameron (142). The release, which is defendant's Exhibit B in evidence, provides that in consideration of the sum of $15,967.00 the plaintiffs release and discharge Pacific Greyhound Lines

> "of and from any and all claims and demands which we now have or may hereafter have, on account of or arising out of an accident which occurred on or about the 11 day of December, 1942, at Point on U. S. Highway No. 99, near Indio, California, resulting in personal injury and property damage.
>
> "It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived.
>
> * * * * * * *
>
> "This release should not be signed unless read by or read to the person signing same.
>
> * * * * * * *

"Section 1542 of the Civil Code referred to in the above release reads as follows:

'1542. Certain Claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release which if known by him must have materially affected his settlement with the debtor.' " (143-144)

At the same time Cameron delivered to plaintiffs one draft payable to "Zoa Zane and Jack Zane, her husband, and Coachella Valley Hospital" in the sum of $14,500.00 (Defendant's Exhibit C in evidence) which draft also contained a "RECEIPT AND RELEASE" providing that the plaintiffs release and discharge Pacific Greyhound Lines "of and from any and all claims and demands which the undersigned now has or may hereafter have on account of or arising out of an accident which occurred on or about the 11 day of December, 1942, at or near the city of Indio, in state of California." Such "RECEIPT AND RELEASE" was signed by the plaintiffs and the draft was endorsed and cashed by the plaintiffs (146-150). It would appear that such draft was deposited by plaintiffs in the Bank of America at Indio on February 27, 1943 (149). Also on February 19th Cameron delivered to the plaintiffs a second draft (Defendant's Exhibit D in evidence) in the sum of $1467.00 payable to "Jack Zane and Zoa Zane, husband and wife, and Coachella Valley Hospital and Dr. W. H. Blackman" which draft contained the same "RECEIPT AND RELEASE" signed by plaintiffs as Exhibit C. The last mentioned draft was endorsed by plaintiffs and delivered to the hospital

(151-154). It was in payment of all hospital and medical expenses up to the date of settlement (154).

Mrs. Zane left the hospital about March 8th and returned to Phoenix. Mrs. Zane paid hospital and medical expenses incurred between February 19th and March 8th, amounting to $140.00, from the $14,500.00 paid her by defendant (169-170). By the time of the trial of this case the plaintiffs had expended the whole of said sum of $14,500.00 (169). Of this sum so expended, plaintiff could only account for approximately the sum of $825.00 expended for medical and hospital expenses and costs of treating injuries since the time of the release (170-173). This $825.00 includes $140.00 paid the hospital at Indio and also a very vague sum paid a Dr. Wilson in Los Angeles (170, 171). After returning to Phoenix Mrs. Zane continued to suffer the same pains and discomfort she had suffered in the hospital in Indio, but did not go to a doctor until August, 1943, when she discovered from X-rays that she had suffered a fractured hip in addition to the other injuries (124, 174). Thereafter, an operation was performed upon the plaintiff, Zoa Zane, by Dr. Lytton-Smith in an effort to produce union of the fracture in the femur, which was unsuccessful. In October, 1943, Jack Zane telephoned to Dr. Blackman in Indio and accused him of being responsible for Mrs. Zane's condition and told him that he should be sued (245-246). The plaintiffs never brought suit against Dr. Blackman (246). The plaintiffs made no demand whatever upon Pacific Greyhound Lines before this suit was filed, which was on December 9, 1944 (247, 20).

Defendant's Exhibit AD in evidence (288-311) consists of monthly bank statements and cancelled checks volun-

tarily produced by Mrs. Zane to show how the plaintiffs expended and what became of the money they received from the defendant. It appears that the $500.00 paid for injuries to the child was paid to Mr. Zane and therefore is not reflected in the bank account of Mrs. Zane (240). From such bank statements it appears that Mrs. Zane deposited in the First National Bank of Arizona in March, 1943, $13,896.65 which she states was the balance of the $14,500.00 paid her by the defendant remaining on hand on her arrival in Phoenix. Between the first of March and the last of June, 1943, there do not appear to be any deposits to the account, and all withdrawals were from the original deposit. On the last of June, 1943, the balance was $11,679.40 (291). In July there were $231.00 in deposits to the account which she testified were from her husband's earnings and other sources. Her balance on the last day of July was $11,625.14 (292). This was the month immediately preceding the time she discovered she had a fractured hip. In August apparently there were no deposits, but there were heavy withdrawals on account of the purchase by the plaintiffs of a home. Her balance at the end of August was $5,044.08 (293). Her balance at the end of September, 1943, was $3,376.24 (294). (There were some deposits during September.) At the end of October her balance was $2,905.85 (296), at the end of November, $2,298.41 (297). We make note of these balances of September, October and November because according to her testimony during those months she was operated upon and was under treatment by Dr. Lytton-Smith and expended some moneys on account thereof. The statements of the months December, 1943, to and including November, 1944 (297-306) show

many deposits to the bank account and continued expenditures and withdrawals. Her bank balance at the end of November, 1944, (just previous to the filing of this suit) was $208.01 (306). Her balance at the last of December, 1944, was $149.27 (307).

From the testimony of Mrs. Zane (268-314) and from the testimony of Mr. Zane (251-259) it appears that some portion of this $14,500.00 was expended by plaintiffs for a home and furnishings, and some portion for Defense Bonds, most of said Defense Bonds having been cashed and expended before the trial of the action. Most of the balance of the money was expended for such things as new automobiles, jewelry, luxuries of all kinds, loans to friends, unexplained moneys paid to Jack Zane, a fine assessed against Jack Zane in a criminal court, and other things wholly unrelated to any cure or treatment of the plaintiff, Zoa Zane.

We believe the foregoing summary of uncontradicted evidence will give the Court a sound basis to follow the argument made by appellant. There is contradictory evidence and some other undisputed facts, but we believe the recitation of the same under this heading would result in unnecessary repetition—such facts can be better handled in the argument.

IV.

SPECIFICATIONS OF ERROR

No. 1. The court erred in denying defendant's motion for a directed verdict in its favor made at the close of all the evidence (444-446) and in denying defendant's motion

for judgment for defendant notwithstanding the verdict and for judgment in accordance with motion for directed verdict (61-62) (denied—67) made pursuant to Rule 50 of the Rules of Civil Procedure for the District Courts of the United States, upon the following grounds and for the following reasons:

(a) The evidence is insufficient to sustain any cause of action in favor of the plaintiffs and is insufficient to support the verdict or the judgment rendered in accordance with the verdict, and the verdict and the judgment are not justified by the evidence and are contrary to the evidence and the law.

(b) It affirmatively appears from the evidence that a proper and legal release was signed and executed by the plaintiffs and delivered to the defendant in consideration of the payment of a substantial sum by defendant to plaintiffs, releasing and discharging the defendant from any and all claims, demands which the plaintiffs had at the time of the execution of the release, or may thereafter have on account of or arising out of the accident in question in this case (143-144).

(c) That such release expressly states that it extends to all claims of every nature and kind whatever, known or unknown, suspected or unsuspected, and the plaintiffs expressly waived all rights under Section 1542 of the Civil Code of California, the terms of said Section being set out in the said release.

(d) That in addition to said release plaintiffs received and endorsed two drafts, one in the sum of Fourteen Thousand Five Hundred ($14,500.00) Dollars (147-150), and one in the sum of Fourteen Hundred Sixty-seven ($1,467.00) Dollars (151-153), releasing and discharging the defendant from any and all claims and demands of the plaintiffs on account of the accident in question in this case.

(e) That there was no evidence showing any intentional fraud on the part of the defendant or any of its agents in procuring the releases, and there was no evidence of any false representation intentionally or knowingly made by any agent of the defendant intended to induce the plaintiffs to execute the release.

(f) That if any false representation was made by any person, there was no competent evidence that such person was an agent authorized to bind the defendant by such a representation.

(g) That if any false representation was made by any person, there was no evidence that the plaintiffs should have relied upon the same or had the right to rely upon it.

(h) That there was no evidence of constructive fraud or mutual mistake sufficient to set aside or rescind a release.

(i) That if there was constructive fraud or mutual mistake, the terms of the release expressly cover the same.

(j) That although plaintiffs seek to rescind a release, they have never offered restitution of the benefits received by them from the defendant on account of the release.

(k) That plaintiffs had expended all the moneys received by them from the defendant before filing this action, and only a small portion was expended in the treatment and cure of the plaintiff, Zoa Zane, of injuries received by her, which were unknown at the time of the execution of the release.

(l) That it affirmatively appears from the evidence that plaintiffs gave defendant no notice of rescission of the release until the filing of this action, although plaintiffs were notified of the additional injuries received by plaintiff, Zoa Zane, and which were unknown

at the date of release, more than one year before the institution of the action, and knew of the alleged false representations during all of that time.

(m) That it affirmatively appears from the evidence that after plaintiffs had knowledge of the additional injuries and after they had knowledge of the falsity of alleged representations made to them by an alleged agent of the defendant, they retained the benefits received by them from the defendant on account of the release, and continued to expend the moneys received by them without notice to the defendant of any defect in the release.

(n) That the defendant was greatly prejudiced by the laches on the part of the plaintiffs and the plaintiffs are estopped and barred from now claiming that the release was obtained through fraud or mistake.

No. 2. The court erred in permitting the plaintiff, Zoa H. Zane, over the objection and motion to strike of the defendant, to testify as follows:

"Q. And were you under the influence of any anaesthetic then?

A. Well, I had locals and they were partly worn off. I was rational then. They took me into the room. I saw it was empty and I made some comment about a private room and the nurse said, 'You have nothing to worry about it as the Greyhound will pay for this.'

Mr. Baker: We move to strike that part of the answer on the ground it is purely hearsay and irrelevant." (90-91)

in that there is no sufficient evidence that some nurse at a hospital was an agent of the defendant, and any statement made by such nurse was purely hearsay.

No. 3. The court erred in permitting the plaintiff, Zoa H. Zane, over the objection and motion to strike of the defendant, to testify as follows:

> "Q. And when you saw Dr. Blackman did you have a conversation with him?
>
> A. Yes. I told him what the nurse told me and asked him if that was right and he said, 'Yes, all you have to worry about is to get well.' He (18) said, 'You don't need to worry about the bills, that they will be taken care of.'
>
> Mr. Baker: "We move to strike that evidence on the grounds previously assigned." (92)

in that there was no sufficient evidence that Dr. Blackman was an agent of the defendant, acting within the scope of his authority, or authorized to bind the defendant, and any statement made by Dr. Blackman is purely hearsay.

No. 4. The court erred in permitting the plaintiff, Zoa H. Zane, over the objection of the defendant, to testify as follows:

> "Q. Now, I believe you stated that from some talk with Mr. Cameron—did you ever have any talks with Mr. Cameron and Dr. Blackman regarding an artificial limb?
>
> A. Yes, I did talk to both of them about it.
>
> Q. About when was that?
>
> A. Well, it was probably the last part of January.
>
> Q. And that was prior to the settlement?
>
> A. Yes.
>
> Q. And will you state what was said at that time, what the conversation was?
>
> Mr. Baker: The same objection we have heretofore made on conversations with either Dr. Blackman and Mr. Cameron.

The Court: You may answer.

(The question was read by the reporter.)

The Witness: Well, they were both in the room together at one time.

Mr. Stahl: That was in your room?

A. Yes, sir; and then they were telling of the people they knew that had artificial limbs, and they both told me that as soon as I was up and had my strength back I would be able to wear an artificial limb and be as good as new, and the only injuries I had was the amputation of my right foot, lower leg.

Q. And do you recall that they had anything with them regarding artificial limbs at that time, or was that later?

A. I think the doctor brought back in one when he was alone, had a pamphlet.

Q. When was that?

A. Well, I think it was even—it was before Mr. Cameron and the doctor were in the room together.

Q. What did he have with him then?

A. He had a pamphlet showing a party who had had an artificial limb high jumping, and he was advertising some brace company that made artificial limbs.

Q. Showing these people using artificial limbs?

A. Yes. He said I would be able to do the same as soon as I was up and could wear an artificial limb.

Q. Now, did you—prior to that time did you have any talks with Dr. Blackman regarding the extent of your injuries?

A. Oh, yes, several times I asked him about (36) my injuries and he always assured me that that was all that was the matter with me, was just the amputation of my right foot and lower leg and a fractured left ankle, which was minor." (105-107)

in that there was not sufficient evidence that Dr. Blackman was an agent of the defendant, acting within the scope of his authority, or authorized to bind the defendant, and there was no evidence that Mr. Cameron was such an agent of the defendant, authorized to make statements for or in behalf of the defendant concerning the physical condition of any person, and the statements made to the plaintiff were purely hearsay insofar as the defendant is concerned.

No. 5. The court erred in permitting the plaintiff, Jack Zane, over the objection of the defendant, to testify as follows:

> "Mr. Carson: What did he say in regard to—What did Dr. Blackman say in regard to the use of an artificial limb, if he said anything?
>
> Mr. Baker: We object to that on the ground it is hearsay as far as the Defendant is concerned.
>
> The Court: All right. He may answer.
>
> Mr. Carson: Do you remember what he said, Jack?
>
> A. Well, he said she would be able to use an artificial limb; there was no other injuries." (200)

in that there was no sufficient evidence that Dr. Blackman was an agent of the defendant, acting within the scope of his employment or authorized to bind the defendant, and any statements made by him to the plaintiff were purely hearsay insofar as the defendant is concerned.

No. 6. The court erred in giving the following instruction to the jury, in response to plaintiffs' Request No. 2 (42-43), and over the objection and exception of the defendant (460-461), to wit:

> You are instructed, that if you find from a preponderance of the evidence that, prior to the execution of the release introduced in evidence, an agent

> or agents of the defendant represented to the plaintiff, Zoa H. Zane, that her only injury was the injury to her right foot and lower right leg, which necessitated the amputation of said leg below the knee, and that she had not sustained any other injuries, and that she would be able to use an artificial limb and avoid the use of crutches, and if you further find from a preponderance of the evidence that said representations were not true and that plaintiffs believed the same and relied thereon, and that had it not been for such representations and such belief and reliance, the plaintiffs would not have executed said release, then, although said agent or agents did not know that said representations were not true at the time they were made, and although there was no fraud or wrongful intent on the part of said agent or agents to deceive or defraud said plaintiff, the plaintiffs are not bound by said release so far as the injuries to the right femur or thigh bone of said plaintiff, Zoa H. Zane, and the results and consequences thereof, are concerned, and the plaintiffs can recover for such injuries and the results and consequences thereof if you find from a preponderance of the evidence that the negligence of the defendant was the proximate cause of said injuries. (447-448)

upon the grounds and for the reasons that the same does not properly state the law applicable to the facts of this case in that it fails to give proper or any effect to the written release admitted and proven in the case and assumes that the release is partially effective and partially void, and is not rescinded in its entirety, and further instructs the jury that plaintiffs are entitled to recover and to set aside the release because of representations made by agents of the defendant claimed to be false, although such falsity

was unknown to the agents, and there was no intentional fraud. Furthermore, it gives no consideration to the admitted fact that plaintiffs had been paid a large sum by the defendant for injuries received in the accident in question, and does not instruct the jury to give credit for such payment; and, furthermore, said instruction conflicts with other instructions given by the court and was confusing and misleading to the jury.

No. 7. The court erred in giving the following instruction to the jury, in response to plaintiffs' Request No. 5 (44-45) and over the objection and exception of the defendant (461) to wit:

> You are instructed that if you find from the evidence that, prior to the execution of the release introduced in evidence, Dr. Blackman represented to the plaintiff, Zoa H. Zane, that the only injuries she had sustained as a result of the accident were the injuries to her right lower leg and foot that necessitated the amputation, and that said plaintiff could use an artificial limb, and if you further find from the evidence that said representations were not true and that said plaintiff, as a result of said accident, sustained a fracture of her right femur or thigh bone resulting in a non-union of said bone with the hip bone, and that said plaintiff could not and cannot use an artificial limb, and if you further find that said representations were believed and relied upon by the plaintiffs, and if you further find that the claim agent of said defendant knew of, approved and ratified said representations, and that the defendant approved the settlement and accepted the benefits thereof, then the defendant is stopped from claiming that said representations cannot be attributed to it, and said release is not a bar to this action. (448-449)

upon the grounds and for the reasons stated in foregoing Specification No. 6, and upon the further grounds that said instruction assumes and instructs the jury that one Dr. Blackman was the authorized agent of the defendant and the defendant is bound by his representations; and, furthermore, assumes that the defendant accepted or received benefits from the execution of the release; and, furthermore, instructs the jury that the plaintiffs are entitled to recover merely because certain representations were later proved to be not true.

No. 8. The court erred in giving the following instruction to the jury, in response to plaintiffs' Request No. 6 (45-46), and over the objection and exception of the defendant (461-462), to-wit:

> You are instructed that if you find from a preponderance of the evidence that the claim agent of the defendant, prior to the signing by the plaintiffs of the release relied on by the defendant, had left with the plaintiff, Zoa H. Zane, a form of release in which the consideration was stated to be $14,500.00 and in which the accident was stated to have resulted in the loss of said plaintiff's right foot and lower leg, and if you further find from the evidence that said plaintiff was led by said claim agent to believe that the release which she was signing and which she signed was the form of release that said claim agent had left with said plaintiff and that as a result said plaintiff signed said release introduced in evidence, then said release is no defense in this suit and your verdict should be for the plaintiffs for such damages as you may find the plaintiffs have sustained by reason of and as a result of the injury to the right femur or thigh bone of the plaintiff, Zoa H. Zane, if you further find from a preponderance of the evi-

> dence that the accident was caused by the negligence of the defendant and that such negligence was the proximate cause of said injury. (449-450)

upon the grounds and for the reasons stated in foregoing Specification No. 6, and upon the further ground that in said instruction the court substantially instructs the jury that the form of release signed and executed by the plaintiffs was not the same form first submitted to them, which is an unjustified conclusion on the part of the court; and, furthermore, said instruction assumes that there was intentional fraud on the part of the agent of the defendant without reciting the elements necessary to constitute intentional fraud, and without proof to sustain intentional fraud; and in said instruction the court instructs the jury that the mere fact standing alone of a release signed and executed by plaintiffs being different from a form of release originally submitted to them entitled the plaintiffs to set aside the executed release and to recover.

No. 9. The court erred in giving the following instruction to the jury, in response to plaintiffs' Request No. 10 (48-49), and over the objection and exception of the defendant (462), to-wit:

> You are instructed that if you find for the plaintiffs, then it is your duty to fix the amount of damages as shown by the evidence relative thereto. In fixing the amount of such damages, if any, you may take into consideration the age of the plaintiff, Zoa H. Zane, the extent of the injuries, if any, to the right femur or thigh bone of said plaintiff, and the results and consequences thereof, her physical and mental pain, suffering and inconvenience already endured, if any, and that she may endure in the future as a result of such

> injury, if any, and the character of such injury, whether temporary or permanent; you may also consider any reasonable expense incurred in the treatment of said injury and her inability, if any, to work and earn money, and to perform her duties and to engage in gainful pursuits, and any impairment of her physical powers and any limitations placed upon her in the enjoyment of her physical faculties by reason of said injury, and allow such sum as will under the evidence compensate the plaintiffs for said injury, not, however, exceeding the sum of $51,565, the amount asked for by the plaintiffs in their compaint. (450-451)

upon the grounds and for the reasons stated in foregoing Specification No. 6, and upon the further grounds and reasons that the court assumed that the plaintiffs were entitled to recover for injuries to the right femur or thigh bone of the plaintiff, Zoa H. Zane, separately from other injuries received by the plaintiff in the accident and without giving consideration to such other injuries and without instructing the jury that it must give credit to the defendant for the amounts paid the plaintiffs for such other injuries.

No. 10. The court erred in refusing, over the exception and objection of defendant (462), Defendant's Requested Instruction No. 2, reading as follows:

> You are instructed that the plaintiffs in this case assert and testify that at the time they signed and executed the written release which is in evidence they did not know that the plaintiff, Zoa Zane, had suffered injuries to her right hip and possibly other injuries and assumed that her only injury was the amputation of her right leg below the knee.
>
> In this respect, you are instructed that the release in question contains, among other provisions, the following clause:

"It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived."

The plaintiff, Zoa Zane, knew generally when she signed the release what it meant and that its effect was to bar her right to sue for any injuries received by her in the bus accident in question although she did not know of or suspect such injuries, or if she attached her signature to said release carelessly and with indifference to her rights and without making any effort to determine the contents of said release then the release must be upheld and the plaintiffs are precluded from recovering in this action unless you find from clear, convincing, and satisfactory evidence that the plaintiffs were induced to sign the release by intentional fraud and deceit on the part of the defendant as I have defined fraud and deceit in other instructions given you in this case. (49-50)

upon the ground and for the reason that the same properly states the law applicable to this case, and the defendant was entitled to such instruction and was prejudiced by the refusal of the court to give the same, and in refusing such instruction the court in substance instructed the jury that the release signed and executed by the plaintiffs was of no force or effect.

No. 11. The court erred in refusing, over the exception and objection of defendant (463), Defendant's Requested Instruction No. 6, reading as follows:

You are instructed that although you may find that plaintiff, Zoa Zane's, hip was fractured in the bus

> accident, and it was falsely represented to her that there was no fracture of the hip, yet the falsity of such representation, if any, will not entitle the plaintiffs to recover unless they go further and prove to your satisfaction by clear and convincing evidence that the falsity of such representation was known to the person making the same at the time he made it, and that he knowingly made a false representation for the purpose of inducing the plaintiffs to execute the release in question, and that plaintiffs relied upon the same. (53)

upon the grounds and for the reason that the same properly states the law applicable to this case, and the defendant was entitled to such instruction and was prejudiced by the refusal of the court to give the same; and upon the ground that although plaintiffs in their complaint and under their requested instructions which were given to the jury sought to recover from this defendant both on the grounds of intentional fraud and constructive fraud, nevertheless the court refused to instruct the jury as to the burden of proof required of the plaintiffs to establish intentional fraud.

No. 12. The court erred in refusing, over the exception and objection of defendant (463), Defendant's Requested Instruction No. 9, reading as follows:

> You are instructed that although you may find from a preponderance of the evidence that the relation of principal and agent did exist to some extent between the defendant company and Dr. Blackman, and statements were made by such doctor to plaintiffs, or one of them, but that said Dr. Blackman was without authority to represent the defendant in the negotiation of a settlement with and a release from the plaintiffs on account of injuries incurred, and

> such statements were not made for the purpose of influencing the plaintiffs in making a settlement, a release subsequently negotiated by an agent of the defendant company without knowledge on his part of the statements made by the doctor cannot be avoided by reason of such statements. (55)

upon the grounds and for the reason that the said requested instruction correctly states the law applicable to the facts of this case, and the defendant was entitled to the same and was prejudiced by the refusal of the court to give the same; and upon the further grounds and reasons that in refusing to give said instruction the court left the convincing inference with the jury that Dr. Blackman was the agent for the defendant for all purposes and the defendant was bound by any statements or representations made by him, although he was not authorized to make such statements and the defendant had no knowledge of the same.

No. 13. The court erred in refusing, over the exception and objection of defendant (463-464), Defendant's Requested Instruction No. 13, reading as follows:

> Even though you should find from the evidence that there were false representations made to the plaintiffs, and that they were induced thereby to accept the money and execute the release, yet if you should further find from the evidence that they failed to rescind the release with reasonable diligence after discovery of the fraud and to notify the defendant of such rescission, and continued to retain and use the consideration paid them for the release for an unreasonable length of time after discovery of the fraud, then the plaintiffs are deemed to have ratified the release, and they cannot now set aside the re-

> lease, and under such a state of facts your verdict must be for the defendant. (57)

upon the grounds and for the reason that said requested instruction properly states the law applicable to the facts of this case, and the defendant was entitled to the same and was prejudiced by the refusal of the court to give the same, and upon the further ground that the undisputed evidence shows that the plaintiffs expended all of the money paid to them by the defendant on account of the release in evidence without giving any notice of rescission of the release and without tendering the return or repayment to the defendant of the moneys received by the plaintiffs, and that after plaintiffs had actual notice that the plaintiff, Zoa Zane, had injuries unknown at time of release, the plaintiffs continued to expend the moneys received by them for the release without notice of rescission or offer to return or repay the moneys to the defendant.

No. 14. The court erred in refusing, over the exception and objection of defendant (464), Defendant's Requested Instruction No. 14, reading as follows:

> You are instructed that if you should find from a preponderance of the evidence that the plaintiffs in this case are entitled to recover, and the release should be set aside and voided, but that the plaintiffs are unable to make restitution to the defendant of the amount or amounts received by them on account of said release, then the defendant is entitled to receive full credit for the amount paid by it to the plaintiffs for said release. In other words, if you should find for the plaintiffs, in arriving at your verdict for damages, if any, to which they are entitled you must first deduct all amounts received by

them from the defendant on account of the release in question. (58)

upon the grounds and for the reason that said requested instruction properly states the law applicable to the facts of this case, and the defendant was entitled to the same and was prejudiced by the refusal of the court to give the same, and upon the further grounds and reason that in refusing said instruction the court substantially instructed the jury that the plaintiffs were entitled to any amount of damages without any credit whatever to the defendant for amounts previously paid by the defendant to the plaintiffs, and without making any deduction from the verdict on account of amounts previously paid by the defendant to the plaintiffs.

No. 15. The court erred in giving all of its instructions to the jury (447-459), upon the grounds and for the reasons that the court by repetition unduly accentuated the plaintiffs' theory of the case, and although the plaintiffs in their complaint sought to recover on several grounds including intentional fraud, constructive fraud, and upon Section 1542 of the Civil Code of California, yet the court in its instructions did not distinguish between these different grounds and theories nor explain nor define the same, and in giving the various instructions did not state to what ground or theory the same were applicable. Therefore, the instructions as a whole were conflicting, confusing, and misleading to the jury.

No. 16. The court erred in denying defendant's alternative motion for new trial (62-65, 67) upon the grounds and for the reasons set forth in Specifications of Error Nos. 1 to 15, inclusive.

V.

ARGUMENT

I. The written release received in evidence is a binding obligation releasing defendant from all injuries received by Zoa Zane, known or unknown, and cannot be set aside on grounds of mistake or "constructive" fraud.

(Specification of Error No. 1, paragraphs a-d, h-i)

The release in question, although designated by plaintiffs in their complaint as a "general" release, is not such, but is express, specific, and detailed. It not only provides that defendant is released "of and from any and all claims and demands which we now have or may hereafter have" but also in separate paragraphs provides that the release applies to all claims of every nature and kind, known or unknown, suspected or unsuspected, and plaintiffs expressly waive all provisions of Section 1542 of the Civil Code of California, the terms of which are quoted (143-144). It is true that plaintiffs withdrew their requested instruction No. 7 (46-47) based upon the Section of the California Code and apparently thereby abandoned their theory of recovering upon such statute, nevertheless, it might be well to review the decisions of the California courts construing such statute.

In *O'Meara v. Haiden,* 204 Cal. 354, 268 P. 334, the Supreme Court held that a "general" release did not bar an action for the recovery of injuries unknown to claimant at the time of the release. But in that case the release did not contain a clause stating it applied to all known and unknown, suspected and unsuspected injuries or a clause expressly waiving all rights under said Section 1542. In *Hudgins v. Standard Oil Company,* 136 Cal. App. 44, 28 P. 2d 433, the release in question did contain the clauses above

mentioned but as stated in *Berry v. Struble,* infra, it is very clear that the District Court of Appeal in the *Hudgins* case gave no consideration to the effect of said clauses and the same was not brought to the court's attention. In *Berry v. Struble,* 20 Cal. App. (2d) 299, 66 P. 2d 746, the California court held that where substantial compensation is paid to a claimant, and in consideration thereof he executes a release specifically providing that the same covers all "known and unknown" injuries, he cannot thereafter rescind the release and recover for injuries which he did not know to exist at the time. In that respect the court stated (reading page 747 of the Pacific Reporter):

> "There does not appear to be any principle of public policy which, in the absence of fraud or duress, would forbid parties who are laboring under no disability from releasing for a consideration all claims arising from a particular accident, whether the injuries be known or unknown."

It is an established rule of law that where it appears from the terms of a release that it was the intention of the parties to discharge a person of all known or unknown claims arising from an accident, in the absence of actual and intentional fraud, the injured person cannot rescind the agreement and recover for injuries unknown at the time the release was executed.

> *Jordan v. Guerra* (Cal. App.) 136 P. 2d 367;
> *Berry v. Struble,* supra.

The California statute referred to apparently permits, in a case where there is nothing but a general release taken, a recovery for injuries unknown at the time of the execution of the release, although there were no false statements

or representations made to the claimant by an agent of the releasee which induced or affected the execution of the same. In view of the specific terms of the release in question in this case, the plaintiffs, while in their complaint they relied upon the California statute, apparently decided to abandon that theory and withdrew from the jury any instructions based on the California statute. As the case was finally submitted to the jury, it was, as we understand it, on two theories: First, that certain representations were made to the plaintiffs that Zoa Zane had no injuries to her hip and no injuries which would incapacitate her from using an artificial limb; that plaintiffs relied upon such statements in executing the release; that such statements were false and that although the person or persons making such statements acted innocently and did not know of their falsity and believed the statements to be true, nevertheless, plaintiffs are entitled to recover. Second, in one instruction requested by plaintiffs and given by the court, the plaintiffs advanced the theory that the mere fact, if such be true, that a claim agent submits one form of release to a claimant but the release actually executed is different in wording than that originally submitted, entitles the claimant to absolutely rescind the executed release. This theory, if it has any soundness whatever, is apparently based upon intentional and actual fraud. At this time we will give consideration to the first theory.

In support of such first theory plaintiffs in the court below relied almost entirely upon a decision of the Supreme Court of the State of Arizona in *Atchison, etc., Ry Co. v. Peterson,* 34 Ariz. 292, 271 P. 406. It is contended that the Supreme Court of Arizona has established the rule that a

claimant in the face of a general release can recover for injuries unknown to him at the time he executed the release where statements are made to him which afterward develop to be false, although the statements were innocently made without knowledge of falsity on the part of the person making the same. This has quite often been referred to by courts as "constructive" fraud. As a matter of fact it is nothing more than mutual mistake. This is established by the Supreme Court of Minnesota in *Jacobson v. Chicago M. and St. P. Ry Co.*, 132 Minn. 181, 156 N. W. 251, which is relied upon by the Supreme Court of Arizona, in arriving at its conclusions in the Peterson case. The Minnesota court said:

> "In such cases the courts grant relief either upon the ground of fraud in law, sometimes spoken of as constructive fraud, or mutual mistake. It is not material whether it be termed fraud in law or mistake; the result is the same in either case."

The *Peterson* case is clearly distinguishable from the case at bar. In the first place, the terms of the release which was executed in the *Peterson* case were given no consideration nor recited nor mentioned in the decision and it is quite evident no point was made before the Supreme Court of the effect of specific and express terms of the release covering unknown and unsuspected injuries, if there were any such terms. Apparently from the decision the release must have been one very general in its terms. It is to be kept in mind that there was no proof whatever that the statements alleged to have been made to the plaintiffs, or one of them, by Dr. Blackman and Mr. Cameron, or one of them, that the only in-

juries received by her were those necessitating the amputation of her right leg below the knee and there was no injury to her hip and she could use an artificial limb, were known to be false. There is no evidence that either of said persons knowingly made a false statement. According to the record such statements made by said persons were wholly innocent and they believed them to be true. By the overwhelming authority if a settlement is made with a person *sui juris* and in his right mind, and a release is executed *which clearly and expressly is intended to cover all known and unknown, suspected and unsuspected injuries resulting from an accident, and is clearly intended to cover "constructive" fraud or mistake,* the claimant is barred and estopped from thereafter recovering for unknown and unsuspected injuries although it afterwards develops that the statements and representations made to the claimant were absolutely false. This is the rule even in Minnesota, the decision of whose Supreme Court is relied upon by the Supreme Court of Arizona in the *Peterson* case.

Hanson v. Northern States Power Co., 198 Minn. 24, 268 N. W. 642;

Moses vs. Carver, 298 N. Y. Supp. 378, 164 Misc. 204;

Hoffman v. Eastern Wisconsin R. & Light Co., 134 Wis. 603, 115 N. W. 383;

Quebe v. Gulf C. & S. F. R. Co., 98 Texas 6, 81 S. W. 20.

In addition to the specific and complete release, defendant's Exhibit B, the plaintiffs signed and executed

two other written releases, defendant's Exhibit C (147) and D (151).

Such exhibits are the vouchers by which the plaintiffs were paid the amounts they demanded for the release. Each voucher contains a complete release of all the injuries resulting from the accident. Each release was specifically signed by the plaintiffs and was not designed to be effective merely by endorsement of the vouchers. While the releases contained in the vouchers are quite general and not as specific and detailed as the main release, nevertheless, they clearly show the intent of the plaintiffs to accept the amounts named in full settlement of all injuries received in the accident.

This case should not have gone beyond the point where it was apparent that no intentional false statement was made to the plaintiffs, and the court should have granted the motion for instructed verdict made at the close of plaintiffs' testimony; in any event, should have granted the motion for instructed verdict made at the close of all the evidence, and if the court desired to take it under advisement, as allowed by the rule, certainly defendant's motion for judgment notwithstanding the verdict, should have been granted.

II. There was no intentional or actual fraud on the part of the defendant.

(Specification of Error No. 1, paragraph e)

Solely for the purpose of this paragraph of the argument, we will assume that the evidence was sufficient to establish agency between Dr. Blackman and Mr. Cameron and the defendant. Dr. Blackman was the physician who attended Mrs. Zane at the Indio hospital and Mr. Cameron

was a claim agent. It was the representations of these two men which Mrs. Zane claims induced her to sign the release.

Mrs. Zane was in the Indio hospital under Dr. Blackman's care from December 11, 1942, to March 8, 1943—almost three months. As stated in the SUMMARY OF UNDISPUTED FACTS, there was no effort on the part of the alleged agents of the defendant to hurry or rush the plaintiffs into a settlement, and there was no effort to induce them to accept a trifling or nominal sum. The first offer made by defendant to plaintiff was $12,000.00, which is certainly substantial (137). There was no effort to isolate Mrs. Zane or to prevent her from consulting persons whom she desired to consult. Mr. Cameron would not deal with Mrs. Zane without the approval of her husband, and at all times urged her to confer with him. He would not accept a release except one executed by the husband in his, Cameron's, presence (141). For the first three weeks that Mrs. Zane was in the hospital, Cameron never discussed the matter of settlement. He was merely solicitous of her welfare (131-135). The first discussion of settlement was after the second operation which was about six weeks after she entered the hospital (136).

A very potent fact is that Cameron was not with the plaintiffs at the time they decided upon what amount they would accept, and could not possibly have influenced them in arriving at such amount (138-140). The plaintiffs themselves, in the absence of Cameron, Dr. Blackman, or any other person, decided that $15,000.00 was a proper amount to accept for the injuries to Mrs. Zane and their minor child. Mrs. Zane, with the approval of

her husband, sent a telegram to Cameron in Los Angeles, stating they would accept $15,000.00 plus hospital expenses (defendant's Exhibit A-139). *Mrs. Zane admits that plaintiffs were paid every dollar they demanded without any further maneuvering or dickering on the part of the defendant* (139-140). This indicates that the plaintiffs and not the defendant were the persons anxious to effect a speedy settlement. This is further brought out by the facts that the telegram was sent on January 29, 1943—Cameron, soon after receiving the same, went to Indio and accepted plaintiffs' offer—as the husband was not present, he left a form of release to be studied and discussed by the plaintiffs.—Thereafter he made no effort to hurry the plaintiffs into a settlement.—It was February 19th before the release was finally executed (141-142). Certainly such facts do not indicate that Cameron thought he was making a settlement which was advantageous and beneficial to the defendant. If he thought the settlement was to the great advantage and benefit of the company, he would have been pressing and urging a speedy execution of the release. On the contrary, his actions indicate that he thought the company was paying the plaintiffs a very large amount and did not seem to care whether the plaintiffs accepted settlement or not.

It is not claimed that Cameron had any knowledge of medicine and, of course, it was apparent that any statements made by him were solely based upon statements of Dr. Blackman. Cameron had no reason to intentionally make a false statement—at no time did he endeavor to induce plaintiffs to accept some small or nominal amount —at no time did he deny liability upon the part of the

defendant company, but on the contrary acknowledged full responsibility for the accident. The amount paid the plaintiffs was substantial. While there is no express testimony to that effect, nevertheless, it is very apparent from all the facts that even if plaintiffs knew that Mrs. Zane had a fractured hip, they still would have accepted $14,-500.00 plus medical expenses for her injuries.

As to Dr. Blackman, there is not even a remote inference that he had any reason and/or object in concealing injuries from the plaintiffs. He was not on a salary with the defendant for the purpose of treating injured passengers, but received pay at the regular rates charged by physicians for all work performed by him, and according to defendant's Exhibit D (151-154), his charges were not small. If he had known that she had an injured hip, certainly he would have treated the same because that would have added to his remuneration.

From Dr. Blackman's deposition (359-407) it appears not only he did not know of the fractured hip at the time Mrs. Zane was in his hospital, but also in spite of subsequent developments showing that in August, 1943, she had a fractured hip, he is quite definitely of the opinion such fracture did not exist while she was in the hospital. He made the usual examination of Mrs. Zane, including a complete examination of the hip region and pelvis. There was no movement of the thigh or shortening suggestive of fracture. He frequently moved and activated her right leg and there was no complaint of pain in the hip, no muscle spasm about the hip which indicated fracture. For such reason he took no X-ray of the hip and was satisfied that there was no fracture (368-369). Plaintiff's

physician, Dr. Lytton-Smith, said under the same circumstances he would not have taken an X-ray of the hip region (228).

Another very potent fact is that Dr. Blackman performed a second operation to repair the stump of Mrs. Zane's leg, and the sole object of that operation was for the purpose of adjusting and fitting the leg to an artificial limb. Certainly, Dr. Blackman would not have repaired the stump to allow the use of an artificial limb if he knew Mrs. Zane had a fractured hip. It is admitted by all the medical witnesses, Dr. Blackman (407), and Dr. Lytton-Smith (229) that a fractured hip, unless repaired and made sound, will not bear the weight of an artificial limb. No physician will perform an operation for the purpose of adjusting a leg to the use of an appliance that would immediately and definitely disclose another injury which he was attempting to conceal.

Dr. Lytton-Smith testified that had he administered treatment to Mrs. Zane as described by Dr. Blackman in his deposition, and had observed the same results, he would have reached the conclusion that there was no fracture of the hip at that time (228-229). He also testified that had he discovered any evidence of fracture in the hip region, he would not have performed the operation to repair the stump (229-230).

We think the evidence is very persuasive that the fracture of the femur discovered in August, 1943, did not exist while Mrs. Zane was in the Indio hospital; and it is conclusive that if it did exist, it was not known to or noticed by Dr. Blackman, and his statements as to the same were wholly innocent. Of course, any statements

by Mr. Cameron based upon information given by Dr. Blackman would also be innocent.

The only other evidence remotely inferring intentional fraud is the testimony of Mrs. Zane that the form of release left with her by Mr. Cameron after she sent the telegram, defendant's Exhibit A, was not the same as the one introduced in evidence, defendant's Exhibit B, in that two of the blanks in the printed form were filled in with different wording (175-176). This is indeed strange. The evidence is that Cameron left this form of release with Mrs. Zane two or three days after January 29th and it remained in her possession until the very time that a release was signed. There is no evidence that Cameron, when he came to Indio on February 19th, brought another release with him—there is no evidence that he ever had this original form of release in his possession after delivering the same to Mrs. Zane. The inference is that Cameron immediately at the time the release was to be executed, by "hocus pocus," sleight of hand, or black magic, substituted another release for the one left with Mrs. Zane. This is ridiculous.

Such a statement becomes more than ridiculous when you consider the following admitted facts: Mrs. Zane claims that in the form left with her the blank space following the printed words, "resulting in" was filled in with the words, "loss of right foot and lower leg" instead of the words, "personal injuries and property damage" as are in the executed release, defendant's Exhibit B. (Compare defendant's Exhibit E—177, with Exhibit B.) In this accident she also received a fractured left ankle which was known to all parties concerned and which was treated and reduced at the hospital (179). It is beyond comprehension

that any claim agent would specify one known injury in a release and omit another known injury. Mrs. Zane testified in the printed form first submitted to her the blank for the amount of compensation paid was filled in with $14,500.00 instead of $15,967.00. It is unexplainable as to why a claim agent should state that amount paid as being $14,500.00 when in fact the company was paying $15,967.00 which included the medical expenses. *Is this clear, convincing and satisfactory evidence of fraud as required by the authorities?* Definitely it is not.

Rice v. Tissow, 57 Ariz. 230, 112 P. 2d 866.

Even admitting that the blank space in the original form of release stated the injuries to be loss of right foot and lower leg, that could make no difference in the determination of this case. Mrs. Zane testifies that the form left with her was identical with the form finally executed except for the filling in of the blank spaces (175). All printed matter contained in the final release was in the original form. As the final release, defendant's Exhibit B, is not incorporated in the printed record by photostatic copy, the court will have to refer to the original, which is in the possession of the Clerk of this Court, to determine exactly what is printed and what is written in script. The releasing clauses are all printed, as well as the clause stating that claimants understand and agree that the release extends to all claims of every nature and kind, known or unknown, suspected or unsuspected, and the clause waiving rights under Section 1542 of the Civil Code of California, and the recitation of the terms of such Section. Mrs. Zane testified that she well knew that the release left with her covered "all injuries known or unknown, or something to that effect"

(176). Under such circumstances, if the alleged original form of release was before us instead of the one actually executed, we would still have the same question of law.

We conclude that there was no clear, convincing and satisfactory evidence of actual and intentional fraud, and if there was, the release extended to all claims of every nature and kind and for a large sum of money paid to them, the plaintiffs agreed that the release covered all claims.

III. There was no competent evidence that a false representation was made by an agent authorized to bind the defendant and no competent evidence that the plaintiffs were entitled to rely upon any such representations.

(Specification of Error No. 1, paragraphs f and g)

The burden was upon the plaintiffs to prove by a preponderance of the evidence that a person making representations to them which were relied upon in executing the release was an agent of the defendant authorized to make the representations.

U. S. Smelting, etc., Co. v. Wallapai Mining Development Co., 27 Ariz. 126, 230 P. 1109.

Further, the burden is upon plaintiffs to prove not only that the person making the representation was an agent of the defendant, but that in making the same, he was acting within the scope of his agency.

45 Am. Jur., page 688.

Agency cannot be proved by declarations of the alleged agent or of a third person.

Bristol v. Moser, 55 Ariz. 185, 99 P. 2d 706.

Insofar as plaintiffs' testimony is concerned, there is no evidence of agency between Dr. Blackman and the defendant company except alleged declarations of Dr. Blackman himself and alleged declarations of Mr. Cameron, a claim agent. It is apparent from the testimony that plaintiffs well knew that Mr. Cameron was nothing but a claim agent for the defendant with limited authority, and he had to submit all major matters to the head office. There was no evidence indicating that Mr. Cameron had the right to employ a physician for the defendant or to bind the defendant by any statements concerning the employment of a physician. Therefore, any evidence introduced by the plaintiffs tending to show agency between Dr. Blackman and the defendant company was out of the mouth of the agent himself, which is not sufficient to establish agency.

The relationship between Dr. Blackman and the defendant company was established by the testimony of Mr. Earl F. Parks, Superintendent of Pacific Greyhound Lines. He testified that the only relationship between Dr. Blackman and the defendant was that he is on the medical staff of the Southern Pacific Company. The Southern Pacific Company being a minority stockholder in the Pacific Greyhound Lines, the employees of the defendant contribute $1.75 a month towards the Hospital Association of the Southern Pacific Company, and if the employees of the defendant become ill, they are entitled to treatment by members of the medical staff of the Southern Pacific Company. If they are injured while on duty, then their cases fall under the State Compensation Acts and they select a doctor of their own choosing. There

is no provision for the treatment of passengers by doctors or hospitals. In case of an accident the injured passengers are taken to the nearest hospital where they can obtain medical attention, regardless of who or where or what it may be. Dr. Blackman is a private, practicing physician in Indio, California, and not retained by Pacific Greyhound Lines, and has no authority whatever to negotiate for the settlement of claims and no right whatever to make any representation to an injured passenger binding the defendant (347-351).

Mr. Cameron had no authority whatever to hire or employ Dr. Blackman, and his duties were restricted to investigation and adjusting claims (331-334).

In our opinion, the proof was wholly insufficient to establish any agency between the defendant and Dr. Blackman. Mr. Cameron was an agent of the defendant but for one purpose only—to adjust and settle claims of injured passengers. He had no authority whatever to employ physicians nor to bind the defendant by any statements concerning the employment of a physician. The plaintiffs well knew that Cameron was nothing but a claim agent and also well knew that Dr. Blackman was not on the payroll of the defendant. They themselves accepted and endorsed the voucher by which Dr. Blackman was paid for his services. They themselves paid all hospital and medical expenses incurred after the settlement. We think the evidence wholly insufficient to establish agency.

IV. The failure of the plaintiffs to notify defendant of the rescission of the release, and the retention by them of the consideration received for the release after they had knowledge of the true facts estops and bars them from recovery in this case.

(Specification of Error No. 1, paragraphs j-m)

If it be true that Mrs. Zane sustained a fracture of her hip at the time of the accident, the evidence indicates that she should have had knowledge of the same before August, 1943. According to her testimony she definitely knew that she could not successfully use an artificial limb and that appears to be the main complaint of the plaintiffs. There is some testimony that she knew before she left the Indio hospital that her right leg was shorter than her left leg, and after she returned to Phoenix, she had continuous trouble and pain, and she never could successfully use an artificial limb. But during all of this time she did not notify the defendant, Dr. Blackman, or any other person of her troubles, and kept expending and using the moneys received for the release. In March, 1943, she had $13,896.65 of the $14,500.00 paid her which was deposited in the First National Bank of Arizona in Phoenix. Although in the month of July other deposits were made to her account, on the last day of July, 1943, she had only $11,625.14 left (292).

In August, 1943, she had X-rays taken and was definitely informed that she had a fractured hip, and if any representations had been made to her, she definitely knew in August, 1943, that they were false (124). The exact date in August when she learned this fact is not certain. Therefore, we cannot fix the exact amount of moneys she had on the date she had the X-rays taken and learned of her

additional injuries, but we do know that on the last day of July she had $11,625.14, and that in August there were no deposits to her account, and on the last day of August, 1943, she had $5,044.08 (293). During August she spent a large amount of money buying a new home, furniture, etc.

Therefore, we know that she had at least $5,000.00 of defendant's money at the time she discovered her additional injuries and the falsity of any representations made to her. She did not notify the defendant of the additional injuries, did not give notice of the rescission of the contract, nor offer restitution of moneys of the defendant still in her possession, but on the contrary retained such moneys and continued to expend them as she saw fit. No notice whatever was given to the defendant until the date suit was filed, December 9, 1944, more than fifteen months after she had definite and explicit notice of the additional injuries received by her.

Although there had been considerable moneys deposited to her account between August, 1943, and December, 1944, nevertheless, at the time she filed suit she had approximately $200.00 in the bank (306, 307). The picture is evident: As long as they had money, the plaintiffs were not interested in additional recoveries, either because the fracture of the hip was not caused by the accident, or because they were well satisfied with the settlement in spite of the discovered injuries not known at the time of the release. Although Mr. Zane called Dr. Blackman in October, 1943, accusing him, in substance, of malpractice, no notice was given to defendant. When they ran out of money then they cast about to find some means of getting additional funds and fell upon the idea of bringing suit for that pur-

pose. As shown in SUMMARY OF UNDISPUTED FACTS, of the more than $5000.00 of the defendant's moneys which plaintiffs had on the last day of August, 1943, not more than 10 per cent was expended on doctors, hospitals, etc., or in the treatment of Mrs. Zane for the additional injuries. The rest was spent for jewelry, automobiles, luxuries and what have you. It is well established that the retention of the consideration of a release by one sui juris, with knowledge of the facts, amounts to a ratification of the release where the retention is for an unreasonable length of time.

45 Am. Jur., page 690;
Chicago, etc., Ry. Co. v. Pierce (Seventh Circuit) 64 Fed. 293;
Anno. 76 A. L. R. 344.

In *Colorado Springs and I. Ry. Co. v. Huntling,* 66 Colo. 515, 181 P. 129, the facts are quite similar to the case at bar. The plaintiff in that case was injured on August 25, 1912, and on November 9th of the same year she executed a release. She charged that such release was induced and procured by reason of false and fraudulent representations on the part of the agents of the defendant, and also charged duress and undue influence. The suit was apparently filed on March 14, 1914. She received a check for $900.00 in consideration of the release, which she did not cash until March, 1913, approximately fourteen months before suit was instituted. The Supreme Court of the State of Colorado held that the plaintiff had retained the moneys received by her on the settlement for an unreasonable length of time, and that defendant was entitled to an instructed verdict; the court in that respect saying (reading page 132):

"If she were misled on any other matter relating to her injuries, except as to the exact location and nature of the fracture (which she claims to have discovered by X-ray examination of March, 1915), she knew the contrary prior to the filing of her complaint March 14, 1914, yet she took no steps to rescind the settlement and continued to check on the proceeds thereof for almost a year thereafter.

"By instruction No. 11 the jury was told that—

"Even though you should find from the evidence that there were false representations made to the plaintiff, and that she was induced by them to accept the money and execute the release, yet if you should further find from the evidence that she failed to rescind the release with reasonable diligence after discovery of the fraud and to notify the defendant of such rescission, she cannot now set aside said release, and on such a state of facts your verdict must be for the defendant."

"This is a correct statement of law, but inasmuch as this record conclusively shows that plaintiff did not rescind with reasonable diligence after she discovered, or ought to have discovered, the truth, there was no evidence upon which the jury could find for her under this rule.

"After she had recovered her health and usual mental condition so as to render her capable of comprehending the settlement made, she was bound either to affirm or disaffirm, and if she did not elect to disaffirm at once, that is, within a reasonable time, she must be considered as having elected to abide by the settlement. And having once, by her conduct, affirmed it, she could not afterwards disaffirm it." *Chicago, St. P. & K. C. Ry. Co. v. Pierce,* 64 Fed. 293, 296, 12 C. C. A. 110, 113.

"At the close of the evidence defendant moved for a directed verdict upon several grounds, among others that there was no proof tending in any manner to avoid the bona fides of the release, and that the evidence conclusively showed that the plaintiff had fully ratified it. This motion was overruled. For the reasons given, it should have been sustained. The judgment is accordingly reversed with directions to the trial court to enter judgment of dismissal herein at the costs of plaintiff."

Even if it can be said that there was intentional fraud on the part of the defendant, the plaintiffs discovered the fraud more than 15 months before any notice was given to the defendant. The prejudice to the defendant is very apparent. By reason of the delay and laches on the part of the plaintiffs, the defendant lost the testimony of the very important witness, Mr. Cameron. The uncontradicted testimony given by Mr. Frazee Burke shows that Cameron was in the employ of the company until approximately one year before the trial of the case, that is, he was in the employ of the company until the spring of 1944 (331). At that time he became mentally incompetent and is still in that condition (331-333). If plaintiffs had notified defendant of the intended rescission of the contract in August, 1943, and had brought action, defendant would have had the benefit of Mr. Cameron's testimony.

Under such circumstances, it must be said that the plaintiffs ratified the release after discovering the fraud, if there was any fraud, and are estopped and barred from recovery, and a verdict in favor of the defendant should have been directed by the court, or the motion for judgment notwithstanding the verdict granted.

V. The court allowed hearsay testimony to be introduced in behalf of plaintiffs which was harmful and prejudicial to defendant.

(Specifications of Error Nos. 2, 3, 4, and 5. Specification of Error No. 16.)

The court, over the objection and motion to strike of attorneys for defendant, permitted evidence to be introduced of a conversation between Mrs. Zane and an unidentified nurse to the effect that the defendant would pay all bills (90-91); a conversation between Dr. Blackman and Mrs. Zane to substantially the same effect (92); a conversation between Mrs. Zane and Dr. Blackman and Mr. Cameron to the effect that her only injury was the amputation of her lower right leg, and that she could wear an artificial limb (105-107); and a conversation between Dr. Blackman and Jack Zane to the effect that Mrs. Zane would be able to use an artificial limb (200). These conversations were all purely hearsay as to the defendant unless it was proved by a preponderance of the evidence that the persons making the same were authorized agents of the defendant and that such statements were made within the scope of the agency. First referring to the conversation between Mrs. Zane and some unidentified nurse set forth in Specification of Error No. 2, there was absolutely no evidence, remote or otherwise, of any agency between such nurse and the defendant.

Referring to conversations between the plaintiffs and Dr. Blackman and Mr. Cameron, we have fully discussed the same in paragraph III of this argument, our contention being that there should have been an instructed verdict in favor of the defendant upon the ground that

there was no competent evidence establishing relationship of agency between Dr. Blackman and the defendant, and no evidence that the alleged statements made by Mr. Cameron were within the scope of his agency. We do not deem it necessary to further elaborate on the subject.

We contend that if we were not entitled to an instructed verdict, nevertheless, the court should have granted our motion for a new trial by reason of the erroneous admission of this hearsay testimony.

VI. The court erred in giving instructions to the jury, at the request of the plaintiffs, which do no properly state the law applicable to the facts of this case.

(Specifications of Error Nos. 6, 7, 8 and 9.

The Court, according to plaintiffs' request No. 2, instructed the jury to the effect that if agents of the defendant represented to the plaintiff, Zoa Zane, that her only injury was that necessitating the amputation of her leg, and that she could successfully wear an artificial limb, and such representations were not true, that plaintiffs were bound by the release insofar as injuries to Zoa Zane's hip are concerned and that plaintiffs could recover for such injuries to the hip no matter if the agents did not know of the falsity of the representations, and no matter how innocently they acted. The instruction appears on pages 447 and 448 of the Transcript of Record and is set out in Specification of Error No. 6. The court again instructed the jury substantially to the same effect in accordance with plaintiffs' request No. 5, the instruction as given by the

court appearing on pages 448-449 of the Transcript of Record and is set out in Specification of Error No. 7.

As we have heretofore contended and argued in paragraph I of this argument, the release fully covered "constructive" fraud and "mutual mistake" and the court was not justified in submitting the case to the jury on those theories. If the court did allow the case to go to the jury on such theories, at least it should also have submitted to the jury the question of the effect of the terms of the release and also should have submitted to the jury the question as to whether the plaintiffs by the terms of the release intended to accept the sums paid them in settlement for all claims for all injuries received in the accident, known or unknown. This the court failed to do.

The instructions complained of in Specifications of Error Nos. 6 and 7 are particularly vicious in the following respects: These instructions are based upon so-called "constructive" fraud or mutual mistake and not upon Section 1542 of the Civil Code of California. If the case fell within the provisions of said Section 1542, under some California decisions it is not necessary to rescind the release in its entirety, but it is held that the release is not applicable to unknown injuries. The instructions in question, however, are based upon fraud, constructive or intentional, and in such event the release is void in its entirety. If the matter was to be submitted to the jury it should have been submitted on the ground that the release was void on account of fraud and the plaintiffs were entitled to recover for all injuries suffered in the accident, the jury giving credit for the amounts theretofore paid plaintiffs by the defendant. This is true under the rule laid down in *Atchison, etc., Ry. Co. v. Peterson,* supra, relied upon by plaintiffs.

The court, according to request No. 6 of the plaintiff, gave an instruction over the objection of the defendant, which instruction appears upon pages 449-450 of the Transcript of Record, and which is fully set out in Specification of Error No. 8, to the effect that if the claim agent of the defendant left a form of release in which the consideration was stated to be $14,500.00 and in which the injuries sustained were stated to have been the loss of plaintiff's right foot and lower leg, and if the jury further find "that said plaintiff was led by said claim agent to believe that the release which she was signing and which she signed was the form of release that said claim agent had left with said plaintiff, and that as a result, said plaintiff signed said release introduced in evidence, then said release is no defense in this suit" and the verdict should be for the plaintiffs for such damages sustained by reason of a fractured hip. This matter is discussed under paragraph II of this argument, and we refer to the argument therein made. It is our contention that the evidence was not sufficient to support such a theory of intentional fraud on the part of the defendant. It is further our contention that if the matter was submitted to the jury, the instruction should have been full and complete. As it stands, the court is instructing the jury that the sole fact that the release executed by the plaintiffs is somewhat different than the form of release originally submitted justifies the jury in wholly disregarding the executed release. According to the instruction of the court, the jury should wholly disregard the executed release even if the changes between the same and the form originally submitted were

immaterial. The court also in said instruction charged the jury that they should wholly disregard the circumstances under which the final release was executed and it did not matter whether the final release was read or not read by the plaintiffs, but if there was any difference whatever between the release originally submitted and that finally signed, then the final release was wholly ineffective.

Again in this instruction the court tells the jury that although under this charge of so-called intentional fraud, the executed release was wholly void, nevertheless, in arriving at the amount of damages, *the jury should only give consideration to the damages suffered by plaintiffs on account of the injury to the hip, and should give no consideration whatever to other injuries received by plaintiff, Zoa Zane, and give no credit to the defendant for the amount paid to plaintiffs.*

Certainly, this instruction is erroneous and very apparently harmful and prejudicial to the defendant, and the court should have granted the motion for new trial.

In response to plaintiffs' request No. 10, and over the objection of the defendant, the court instructed the jury which appears on pages 450-451 of the Transcript of Record and is set out in Specification of Error No. 9, on the measure of damages to which plaintiffs were entitled. Again in this instruction the court told the jury that although plaintiffs sought to set aside a release on the grounds of fraud they could claim that such release was set aside only in part. In other words, it was not necessary that the release be set aside in its entirety, but the plaintiffs could accept the benefits of the part of the contract they desired to accept and reject the rest. The jury was

definitely told that it was not required to consider all injuries received by plaintiff, Zoa Zane, in the accident or to give consideration to the fact that defendant had paid the plaintiffs $15,967.00, and were not required to give defendant any credit whatever for amounts paid plaintiffs before the institution of the suit.

We think this was error, and the motion for new trial should have been granted.

VII. The court erred in refusing, over the exception and objections of the defendant, instructions requested by the defendant which correctly stated the law applicable to the facts of this case, and the refusal of which prejudiced the defendant.

(Specifications of Error Nos. 10, 11, 12, 13, and 14. Specification of Error No. 16.)

Defendant's requested instruction No. 2 was refused by the court (49, 462). In this request defendant asked the court to instruct the jury that the release in question contained a clause expressly stating that the same extended to all claims of every nature and kind, known or unknown, suspected or unsuspected and expressly waiving all rights under Section 1542 of the Civil Code of California, and to further instruct the jury that if the plaintiff, Zoa Zane, knew generally when she signed the release that its effect was to bar her right to sue for any injuries, although she did not know of or suspect such injuries, or if she attached her signature to said release carelessly or with indifference to her rights and without making any effort to determine the contents, then the release must be upheld unless the jury find from clear, convincing and satisfactory evidence that there was intentional fraud on the part of the de-

fendant. This instruction was particularly designed to offset the vices of the instructions given by the court at the request of the plaintiff set forth in Specifications of Error Nos. 6 and 7 in which the court submitted to the jury the questions of constructive fraud and mutual mistake without any consideration to the terms of the release or the intent of the plaintiffs in executing the same, and also in an attempt to cure the vices in the instruction given by the court at the request of the plaintiff set forth in Specification of Error No. 8 in which the court stated that the mere fact that the executed release was different in wording than the form originally submitted by the claim agent of the defendant justified the jury in disregarding the executed release, regardless of the circumstances under which it was executed.

The jury certainly should have been allowed to consider the intent of the parties when they executed a release expressly discharging the defendant from all claims of every nature and kind, known or unknown, suspected or unsuspected. They certainly should have been allowed to consider the circumstances under which the plaintiffs finally executed the release—did they use diligence or did they demonstrate complete disregard of the terms of the release? This is particularly true when it is admitted by the plaintiffs that the printed terms of the release originally submitted were exactly the same as the executed release, that is, it was generally in the same form. The only difference being in the wording contained in two blanks. This is particularly true when it is admitted by the plaintiffs that the terms of the release were discussed at the time it was signed. This is particularly true when it is ad-

mitted by the plaintiffs that in addition to said separate release, they executed releases in connection with the vouchers by which they were paid the compensation.

In its request No. 6 (53, 463) defendant requested the court to instruct the jury to the effect that although the jury may find that Zoa Zane's hip was fractured in the bus accident and it was falsely represented to her that there was no fracture, yet the falsity of such representation would not entitle the plaintiffs to recover unless they go further and prove by clear and convincing evidence that such falsity was known to the person making the same at the time he made it. The court, at the request of the defendant, did instruct the jury generally to the effect that fraud is never presumed and it must be established by clear, convincing and satisfactory evidence (452), but did not specifically instruct the jury on the burden required of the plaintiffs to prove false representations. In light of all other instructions given by the court, we think we were entitled to this instruction, and it was error to refuse it.

The court refused defendant's requested instruction No. 9 (55, 463) to the effect that although the relation of principal and agent did exist to some extent between the defendant and Dr. Blackman, but that said doctor was without authority to represent the defendant in the negotiation of a settlement of a claim, then any statements made by such doctor not for the purpose of influencing a settlement or release subsequently negotiated by an agent of the defendant company without knowledge on the agent's part of the statements made by the doctor, cannot avoid the release. This instruction was requested in view of the

fact that it was admitted that Dr. Blackman being upon the staff of the Southern Pacific Company, did treat employees of the defendant for certain illnesses, but he was not on the payroll of the defendant and had nothing to do with the treatment of injured passengers. We think we were entitled to the requested instruction to distinguish between his authority when treating employees under the Southern Pacific contract and when treating passengers, and it was error to refuse the same.

45 Am. Jur, page 688.

The court refused defendant's requested instruction No. 13 (57, 463) set out in Specification of Error No. 13 to the effect that even though the jury should find that there were false representations made to the plaintiffs by which they were induced to accept money from the defendant and execute a release, yet if the jury further found that the plaintiffs failed to rescind the release with reasonable diligence after discovery of the fraud and continue to retain and use the consideration paid them for the release for an unreasonable length of time after discovery of the fraud, then the plaintiffs ratified the release and cannot set the same aside.

In paragraph IV of this argument defendant contends and insists that the evidence is such that the defendant was entitled to an instructed verdict because it was conclusive that the plaintiffs had actual and definite knowledge of the alleged fraud in August, 1943, but gave no notice of rescission until more than fifteen months later when suit was filed, and in the interim retained more than $5000.00 of defendant's money and expended the same for their own use. We strongly contend that the retention of

benefits of the release by the plaintiffs for the period of fifteen months without giving notice of rescission was an unreasonable length of time, which clearly prejudiced the defendant in the defense of this action in that evidence which would have been available has become unavailable.

If the court did not think that fifteen months was an unreasonable length of time as a matter of law for the plaintiffs to retain the benefits of the release without notice of rescission and therefore did not see fit to grant an instructed verdict on that ground, certainly the question of what is a reasonable or unreasonable length of time for the plaintiffs to retain these benefits and fail to give notice of rescission should have been submitted to the jury. The court's failure to do so was error and highly prejudicial to the defendant.

Defendant, in its requested instruction No. 14 (58, 464), which was refused by the court, requested the court to instruct the jury that if they found that the release should be set aside and avoided and that plaintiffs are entitled to recover, but that the plaintiffs are unable to make restitution to the defendant of the amount or amounts received by them on account of said release, then the defendant is entitled to receive credit for the amount paid to the plaintiffs—in other words, the jury in arriving at damages should first deduct all amounts received by plaintiffs from the defendant. In view of the damage instruction given by the court at the request of the plaintiffs set forth in Specification of Error No. 9 the defendant was entitled to this instruction, keeping in mind that this case was not submitted to the jury under Section 1542

of the Civil Code of California but was submitted on the theory of fraud, constructive or intentional. Fraud, if proven, vitiates the entire contract. It must be remembered that in the complaint it is admitted that the plaintiffs received at least $14,500.00 on account of the release and by the proof it is shown that they received another $1467.00 on account of hospital and medical expenses. Furthermore, it is expressly alleged in the complaint that the plaintiffs are making no restitution to the defendant on account of the fact that either they had expended the money before they discovered the fraud, or had been compelled to expend it thereafter to cure the plaintiff, Zoa Zane, of the injuries received by her unknown at the time of the release.

Regardless of such facts, and regardless of the pleadings, the court insisted throughout its instructions in submitting this case to the jury upon the theory that the contract was avoided only in part and not in its entirety and insisted upon instructing the jury that it should give no consideration to the amount of moneys paid to the plaintiffs by the defendant before the institution of the action.

This was indeed prejudicial to the defendant, and the motion for new trial should have been granted.

VIII. The court's instructions to the jury were conflicting and confusing and unduly accentuated plaintiffs' theory of the case.

(Specification of Error No. 15. Specification of Error No. 16.)

In the charge to the jury there was undue and unnecessary repetition of instructions in favor of the plaintiff. The instructions are conflicting and confusing in that the

plaintiffs, in their complaint which was read to the jury at the beginning of the trial, sought to recover on three different grounds: (1) constructive fraud; (2) intentional fraud; (3) under Section 1542 of the Civil Code of California. The court in its instructions made no effort to define or explain these three different theories nor to distinguish between them. Although plaintiffs withdrew their requested instruction under said Section 1542, the court did not explain to the jury that they could not find for the plaintiffs on that theory.

IX. The court should have granted defendant's alternative motion for new trial.

(Specification of Error No. 16)

Defendant's alternative motion for a new trial (62-65) set forth all the grounds contained in Specifications of Error Nos. 1 to 15, inclusive. We therefore refer to paragraphs I to VIII, inclusive, of this Argument in support of our contention that at least a new trial should have been granted.

Respectfully submitted

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